Filed 12/18/08 In re J.S. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.S., a Person Coming Under the Juvenile Court Law.	B204434
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. E.S., Objector and Appellant.	(Los Angeles County Super. Ct. No. CK61816)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Hughes, Juvenile Court Referee. Reversed and remanded with direction.

Aida Aslanian, under appointment by the Court of Appeal, for Objector and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and William D. Thetford, Deputy County Counsel, for Petitioner and Respondent.

Father E.S. appeals from the trial court's order terminating his parental rights in minor J.S. We remand for the limited purpose of permitting the court to inquire further into J.S.'s possible Indian heritage.

FACTS AND PROCEEDINGS

Minor J.S. was born in November 2001 and has lived with her maternal grandparents since infancy. J.S.'s mother identified appellant E.S. as J.S.'s father and he is named on her birth certificate. In October 2005, mother gave birth in Orange County to a second child fathered by a man mother knew only as "[R]." At delivery, both she and the newborn tested positive for methamphetamine.

In November 2005, Orange County's Social Services Agency filed a petition in Orange County superior court alleging mother's drug abuse put J.S. at risk of harm and neglect. The petition further alleged that father E.S., whose address was unknown, had failed to provide for J.S.'s care. Attempting to give father notice of the dependency proceedings, the social services agency sent a registered letter to father at an address in Vancouver, Washington provided by J.S.'s maternal grandmother. The agency received no response to the letter, and other efforts to locate father's whereabouts failed. Finding the agency had exercised due diligence trying to locate father, the dependency court took father's default in December 2005 and sustained the petition's allegations against him.

The Orange County Superior Court thereafter transferred the matter to Los Angeles Superior Court because the legal residence of J.S. and her sister was Los Angeles County. Following the transfer to Los Angeles, respondent Department of Children and Family Services assumed responsibility for J.S.'s case. Respondent conducted its own due diligence attempting to find father, including sending letters in January and February 2006 to the Vancouver address. The February letter was returned marked "Moved Left No Address, Unable to Forward, Return to Sender." Mother, who reported father contacted J.S. "on occasion" and had a good relationship with the child, told respondent that father had been living for the past four years with his new family in

Portland, Oregon. Respondent successfully contacted father in Portland when he signed and returned on February 18, 2006, a receipt acknowledging delivery of a letter to him from respondent. The following week respondent followed-up with a "contact letter" to father informing him of the proceedings and asking him to phone respondent. Father did not respond to that letter.

In August 2006, the dependency court set a permanent planning hearing for December 2006 to terminate father's parental rights in J.S. and place her for adoption. Respondent sent notice to father of the hearing, but because the notice was defective the court continued the hearing to April 2007 for proper notice. In April, the court continued the hearing yet again to allow respondent to send proper notice. The court set the new hearing date for July 30, 2007.

On May 1, 2007, father contacted respondent for the first time. He stated he objected to J.S.'s adoption by her maternal grandparents. At the July 30 hearing, which was father's first appearance in the dependency proceedings in the 17 months since he had received notice of the action, father reiterated his objection to termination of his parental rights and J.S.'s placement for adoption. During the hearing he indicated he intended to retain private counsel for the permanent planning hearing, which the court continued to October 2007 to permit proper notice. Between his appearance at the July hearing and the continued hearing in October, father did not visit J.S.; indeed, his only visit with J.S. from the filing of the petition in November 2005 until the permanent planning hearing in October 2007 was one visit in December 2006.

The October 18, 2007, the permanent planning hearing began shortly after 10:30 in the morning. Father had not retained counsel as promised in July and asked the court to appoint counsel for him. The court appointed attorney Hans Chen to represent father and adjourned the hearing until the afternoon to give Chen time to review the case file. The afternoon session began shortly after 3:00 p.m. By that time, father had with his counsel's consent, and the court's apparent acquiescence, left for the day to go to work. When the afternoon session began, attorney Chen informed the court that father had told him he did not remember signing "any return receipt last year" – which presumably

meant respondent's February 2006 letter to Portland – but "does remember signing some sort of . . . court documents or mail document this year." The court noted the record showed father had signed the "return receipt," and rejected counsel's proposal that "since we excused [father] earlier today . . . I'm thinking we can trail this until another day" to resolve the discrepancy between the record and father's memory. Having denied attorney Chen's request for a continuance, the court proceeded with the hearing and found the record showed "no contact" between father and J.S. The court further found no facts supported elevating appellant's status from an "alleged father" to a "presumed father." The court thus terminated father's parental rights. This appeal followed.[1]

DISCUSSION

1. Continuance Properly Denied

When the October 18 permanency planning hearing resumed for its afternoon session, father's counsel requested a continuance. Father asserts that Welfare & Institutions Code section 366.26, subdivision (g) supported granting a continuance. That statute states: "The court may continue the [366.26] proceeding for a period of time not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case." (Welf. & Inst. Code, § 366.26, subd. (g); see also Welf. & Inst. Code, § 352, subd. (a) [dependency court has discretion to continue any hearing upon showing of good cause].) Father contends the court erred by denying him a continuance because the denial undermined his right to effective counsel. (See *In re Julian L.* (1998) 67 Cal.App.4th 204, 208 [suggests court erred in denying brief

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[1] Respondent contends father does not have standing to appeal from the termination order because as merely J.S.'s alleged father he was not a party to proceedings involving her. The authority respondent cites for its contention is, however, distinguishable. In that case, *In re Joseph G.* (2000) 83 Cal.App.4th 712, the alleged father did not have standing because he had not established he was the child's biological father, let alone an alleged or presumed father. (*Id.* at p. 715.) Here, however, little doubt seems to exist about father's paternity of J.S.

continuance to allow newly appointed counsel time to learn parent's wishes about the case]; but see *In re J.I.* (2003) 108 Cal.App.4th 903, 911-912 [no abuse of discretion to deny continuance to permit attorney to locate parent who had received notice of hearing terminating parental rights to let attorney determine parent's views].) We find the court did not err.

We review denial of a continuance of a permanency planning hearing for abuse of discretion. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180; *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.) The law views such continuances with disfavor. (*Ibid.*) Here, father voluntarily absented himself from the afternoon session. Father had notice of the stakes involved in the permanency planning hearing and proposed termination of his parental rights, but left the courthouse anyway. Father's attorney came to regret father's early departure, but father's decision not to attend the afternoon session was his own. The court therefore did not abuse its discretion in denying a continuance of a hearing that father had elected not to attend.

But even if, on the other hand, the court did err in denying a continuance, father cannot show the court's error prejudiced him. Father contends the court's refusal to grant a continuance undermined the effectiveness of his counsel's representation of him. To show reversible error involving the quality of representation by counsel in a dependency proceeding, father must show that absent the error a more favorable outcome for him was reasonably probable. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252-1253; *In re Malcolm D.* (1996) 42 Cal.App.4th 904, 914, 919.)[2] Here, the prejudice father contends he suffered was his counsel's inability to offer evidence that would have elevated father from his status as merely an alleged father to the higher station and greater rights of a presumed father. A presumed parent has an on-going relationship with a child that the

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[2] Father contends the standard of review for denial of a continuance is harmless beyond a reasonable doubt. The authorities he cites for his contention are, however, inapt. His authorities involved due process violations of the magnitude of, for example, lack of notice. None of the authorities involved denial of a continuance.

law wants to foster and encourage. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451; *In re Raphael P.* (2002) 97 Cal.App.4th 716; *In re Jerry P.* (2002) 95 Cal.App.4th 793, 801-802.) Among the rights appellant hoped to exercise if the court were to declare him a presumed father was the right to reunification services with J.S. (Welf. & Inst. Code, § 361.5, subd. (a) [alleged parent not entitled to reunification services]; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1410.) Reunification services presuppose, however, a parent-child relationship to restore; a dependency proceeding is not the forum to create a parent-child relationship that had not previously existed. As the court in *In re Vincent M.* (2008) 161 Cal.App.4th 943, recently explained:

> " '[O]nly a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5.' [Citation.] ' "[P]arental rights are generally conferred on a man not merely based on biology but on the father's connection to the mother [and/or] child through marriage (or attempted marriage) or his commitment to the child." ' [Citation.]" (*Id.* at p. 954.)

Father carried the burden of showing with a preponderance of evidence that he had a relationship with J.S. sufficient to make him her presumed father, and not merely an absent biological father enjoying no relationship with her. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.) To achieve presumed father status, father needed to show either (1) he and J.S.'s mother were, tried to, or had been, married; or (2) he received J.S. into his home and held her out to the rest of the world as his daughter; or (3) he signed a voluntary declaration of parentage under Family Code section 7570.[3] Here, DCFS

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[3] Family Code section 7611 sets out the criteria for presumed fatherhood: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions: [¶] (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. [¶] (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

apparently accepted father was J.S.'s biological parent. Based, however, on their virtually nonexistent relationship, respondent and the court deemed appellant to be merely an alleged father. Father had lived in Oregon while J.S. lived with her maternal grandparents since infancy. Before respondent filed the dependency petition, father visited J.S. once or twice a year, but had no contact with her in the 17 months immediately following the petition's filing. His first contact with her during the proceedings was in December 2006. He then had no further contact, including between July 2007 when he appeared in court for the first time and October 2007 when he knew his relationship with her was at risk of termination.

Father's evidence of a relationship with J.S. is thin. He was at the hospital for her birth, and is named her father on her birth certificate. He visits her from Portland as much as he can, which is about once or twice a year, and the visits go well. In addition, in the four years since her birth he paid two or three months of child support. Given such evidence, we conclude that even if father's counsel had presented that evidence to the court during the permanency planning hearing, it is not reasonably likely the court would have declared appellant to be a presumed father. Indeed, the facts father cites were part of the dependency record included in the social workers' reports, so presumably the court was aware of them and nevertheless did not rule in father's favor.

Appellant asserts he was deemed an alleged father solely on the say-so of an Orange County social worker who handled J.S.'s case before it was transferred to Los

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[¶] (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) With his consent, he is named as the child's father on the child's birth certificate. [¶] (2) He is obligated to support the child under a written voluntary promise or by court order. [¶] (d) He receives the child into his home and openly holds out the child as his natural child."

Angeles County. He contends respondent unthinkingly adopted the social worker's characterization of him based on a court stipulation filed in Orange County that reflected the case worker's assessment that he was merely an "alleged father." He contends the social worker was mistaken, and that respondent erred by adopting that mistake. Father's contention is unavailing, however, because he points to no evidence that would elevate him to presumed fatherhood. For example, he does not claim that he and J.S.'s mother were ever married or attempted to marry. (Fam. Code, § 7611, subds. (a), (b), (c).) He does not claim he received J.S. into his home and held her out to the world as his daughter. (Fam. Code, § 7611, subd. (d).) And finally, he does not suggest that he signed a voluntary declaration of parentage. (Fam. Code, § 7611 incorporating Fam. Code, § 7570.)

2. Limited Remand Required to Comply with Indian Child Welfare Act

Early in the proceedings, the court found the Indian Child Welfare Act did not apply, presumably because mother identified father and herself as having Filipino heritage. During the permanent planning hearing on October 18, 2007, however, father filed a Judicial Council form stating "I may have Indian ancestry." The court did not address or inquire further into father's disclosure. This was error.

The duty to inquire and, when appropriate, give notice of a child's possible Indian ancestry continues up to, and includes, the hearing ordering the child's final adoption. (Welf. & Inst. Code, § 224.2, subd. (b).) A duty to give notice of the dependency proceedings to tribes to which a child might belong arises if dependency authorities know or have reason to know the minor is an Indian child. (Welf. & Inst. Code, § 224.2, subd. (a).) A child's Indian ancestry need not be certain to trigger the requirement to provide notice. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266-1267; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.)

The duty to inquire arises upon even a lesser showing than for giving notice. (Compare Cal. Rules of Court, rule 5.481, subd. (a)(4) [duty to *inquire* if "Indian child is or *may be* involved"] to rule 5.481, subd. (b)(1) [duty to give *notice* if "an Indian child *is*

involved"] (italics added).) *In re Alice M.* (2008) 161 Cal.App.4th 1189 observes "there are many instances in which vague or ambiguous information is provided regarding Indian heritage or association (e.g., 'I think my grandfather has some Indian blood.' 'My great-grandmother was born on an Indian reservation in New Mexico.'). In these types of cases . . . inquiry is necessary . . . ." (*Id.* at p. 1200.) Here, father's checking a box on a Judicial Council form stating "I may have Indian ancestry" is the sort of vague information that obligated the court and respondent to inquire further to determine whether formal notice under the Indian Child Welfare Act was needed.

Respondent contends father lacks standing to assert errors under the Indian Child Welfare Act because, respondent reasons, only a parent may demand notice to tribes and only a presumed, not alleged, father is deemed a parent. In support of its contention respondent cites *In re Daniel M.* (2003) 110 Cal.App.4th 703, but that decision is distinguishable. There, the father lacked standing because he had neither acknowledged nor established he was the child's biological parent. (*Id.* at p. 706.) Here, in contrast, father's biological connection to J.S. is not disputed. Under the ICWA, a parent includes a biological parent. (*Id.* at p. 708.) The illumination *In re Daniel M.* offers on the matter of father's standing is nonetheless neither here nor there because the right to notice under the ICWA protects the rights of Indian tribes, not just parents. And to protect tribal rights, a dependency court has an ongoing duty separate from the parents to provide notice of the dependency proceedings if it has reason to believe a minor is an Indian child (Welf. & Inst. Code, § 224.2, subd. (b); 25 U.S.C. § 1912, subd. (a); *In re Daniel M., supra,* at p. 707.) It follows therefore that a biological parent's lack of standing under the ICWA does not release the court from its obligations under the ICWA. Because the court failed to inquire into J.S.'s possible Indian heritage, we must therefore remand this matter for the limited purpose of permitting the court to make such an inquiry. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 705-706.)

DISPOSITION

The order terminating parental rights is reversed and the matter is remanded to the juvenile court with directions to order respondent DCFS to inquire into J.S.'s possible Indian heritage. (Cal. Rules of Court, rule 5.481, subd. (a)(4).) If such an inquiry reveals no basis to know or have reason to know J.S. is an Indian child, the order terminating parental rights shall be reinstated. (Welf. & Inst. Code, § 224.2, subd. (b).) If, however, the inquiry uncovers a basis for any knowledge or suspected knowledge that J.S. is an Indian child, respondent must comply with the notice provisions of the Indian Child Welfare Act. If after receiving notice of the proceedings a tribe claims J.S. is an Indian child and exercises its right to intervene in the proceedings, it may seek relief as provided under the Indian Child Welfare Act. If, on the other hand, no Indian tribe intervenes in the proceedings after receiving proper notice, the order terminating parental rights shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.